

## **New York High Court Holds That All Sums Allocation Method And Vertical Exhaustion Applies**

May 4, 2016

On May 3, 2016, New York's highest court in *In the Matter of Viking Pump Inc., and Warren Pumps, LLC*, Insurance Appeals held that, in the context of long-tail claims, an "all-sums" allocation method should apply pursuant to which each excess policy can be held liable for an entire loss when the policies at issue contain non-cumulation and prior insurance provisions. The New York justices also found that "vertical exhaustion" applies, under which Viking Pump, Inc. ("Viking") and Warren Pumps LLC ("Warren") can trigger excess coverage for certain years even if their primary policies for other years have not been exhausted.

Viking and Warren brought actions in the Delaware Chancery Court against more than 20 excess insurers. The Delaware Chancery Court ruled for Viking and Warren, holding that, based upon the non-cumulation and prior insurance policy language and New York law, an all sums allocation should apply. After transfer to the Delaware Superior Court, that court held that, under New York law, Viking and Warren were required to horizontally exhaust all triggered primary and umbrella insurance layers before triggering any excess coverage.

Both the excess insurers and the pump manufacturers filed appeals with the Delaware Supreme Court. Concluding that a resolution of the appeal depended on significant and unsettled questions of New York law, the Delaware Supreme Court asked the New York Court of Appeals to decide the key issues in a pair of certified questions: (1) under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions; and (2) given the Court's answer to Question #1, under New York law and based on the policy language at issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance. In the decision, the New York Court of Appeals held that, based on policy language, a pro rata allocation is inconsistent with non-cumulation and prior insurance provisions and an all sums allocation method should apply to policies containing those provisions. The Court grounded its decision on New York's strong adherence to principles of contract interpretation. Relying on authority from other jurisdictions, the Court stated that, "[s]uch policy provisions plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may 'also [be] covered in whole or in part under any other excess [p]olicy issued to the [Insured] prior to the inception date' of the instant policy."

As to exhaustion, the Court held that vertical exhaustion is more consistent than horizontal with the policy language tying attachment of the excess policies specifically to identified underlying policies that span the same policy period and concluded "that the excess policies are triggered by vertical exhaustion of the underlying available coverage within the same policy period."

The Court of Appeals surprising decision leaves many unanswered questions concerning how to perform the allocation it describes, including, but not limited to, how to deal with an insurance program in which not all policies have non-cumulation provisions or whether it applies to policies with "those sums" rather

than “all sums” language. Should you wish additional information regarding this decision, please do not hesitate to contact us.